Supreme Court, U.S.
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No. 04-1495

IN THE

Supreme Court of the United States

MICHAEL HARTMAN *ET AL.*,

Petitioners,

v.

WILLIAM G. MOORE, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below properly applied this Court's decisions in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and *Crawford-El v. Britton*, 523 U.S. 574 (1998), when it held that where the plaintiff in a *Bivens* action has presented compelling evidence that the defendant officers procured his criminal indictment and prosecution in retaliation for his exercise of First Amendment rights, and the defendant officers have not shown that they would have pursued the charges absent retaliatory motive, the defendant officers are not entitled to qualified immunity.

2. Whether, if so, the court of appeals correctly interpreted the law of its own circuit in holding that the First Amendment right to be free from retaliatory prosecution was clearly established at the time of the defendants' conduct.

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INTRODUCTION

In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court made clear that the government violates the First Amendment if, in subjecting an individual to an otherwise proper adverse action, the government does so "by reason of [the individual's] exercise of [his] constitutionally protected First Amendment freedoms." *Id.* at 283-84. And in *Crawford-El v. Britton*, 523 U.S. 574 (1998), this Court held that government officials defending against a *Mt. Healthy*-style First Amendment retaliation claim are not entitled to qualified immunity simply because their conduct was "objectively valid, regardless of improper intent." *Id.* at 594 (internal quotation marks omitted). The D.C. Circuit's decision below that the claimed existence of probable cause, in and of itself, does not entitle Petitioners to qualified immunity from Respondent's claim that he was prosecuted in retaliation for his exercise of First Amendment rights represents nothing more than the straightforward application of these two precedents.

Petitioners contend that this Court should nevertheless review the decision below to resolve an alleged circuit split. But Petitioners overstate the disagreement among the lower courts. At least three circuits apply a rule entirely consistent with the decision below. And those decisions in purported conflict with the opinion below not only demonstrate superficial treatment of the legal issues and uncritical reliance on circuit precedent predating *Crawford-El*, but also involve underlying facts that differ substantially from the unique circumstances of this case. Indeed, the rule applied by the D.C. Circuit would likely yield the same result as that of the purportedly conflicting decisions in the vast majority of circumstances. For these reasons, the lower courts ought to be given the opportunity to more fully address the matter and reconcile their decisional law with the relatively recent ruling in *Crawford-El*.

In any event, given that other procedural mechanisms already exist to prevent most retaliatory prosecution claims from proceeding to trial, the D.C. Circuit's decision to allow this case to proceed to trial represents a truly "rare circumstance" that does not create an issue of substantially recurring importance. Moreover, even if the Court wished to address the matter, this case would not present an appropriate vehicle for doing so. The court of appeals' decision is interlocutory, and this Court would benefit from a full factual record. In particular, even on their own view of the law, Petitioners' claimed entitlement to qualified immunity is entirely hypothetical because the district court found that there are material facts in dispute concerning whether there was probable cause to prosecute Moore. Thus, not only are there alternative grounds on which denial of qualified immunity would be proper even if this Court were to disagree with the D.C. Circuit's decision, but the Petitioners' qualified-immunity claim will embroil this Court in precisely the sort of factual dispute that should not be appealed until a final judgment is issued. The petition should be denied.

STATEMENT OF THE CASE

Until the events at issue here, the career successes in the life of Respondent William G. Moore, Jr., showed that he had seemingly unlimited potential. In 1982, Moore was recruited to turn around Recognition Equipment Inc. ("REI"), a pioneer in optical-scanning technology that had fallen on hard times and was flirting with bankruptcy. C.A. App. 848-49.[1] Within a year, Moore returned the company to profitability and increased its stock price more than six-fold. *Id.* Moore was widely acclaimed for REI's turnaround,

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[1] Citations to "C.A. App. __" refer to pages of the Appendix jointly filed below.

with *Forbes Magazine* opining that "[f]ew [corporate] turnarounds owe so much to a single executive." C.A. App. 849-50. Moore's seemingly unlimited prospects, however, were destroyed by Petitioners (the "Postal Inspectors"[2]), who subjected Moore to years of investigation and an unfounded prosecution in retaliation for his criticism of, and lobbying against, the United States Postal Service ("USPS") and its senior management. Although Moore was easily acquitted upon motion at the end of the Government's six-week case, his company and his career were ruined.

1. The Scanner Controversy. The facts leading to Moore's downfall revolve around the Postal Service's decision to automate its mail-sorting processes by purchasing hundreds of millions of dollars of optical-character-reading devices. C.A. App. 1019-21, 1035-50. In late 1983, Postmaster General ("PMG") William Bolger announced that the Postal Service would purchase foreign-made single-line scanners, which were dependent upon use of nine-digit zip codes, rather than multi-line scanners of the sort made in the United States by REI, which could be used effectively with five-digit zip codes. Pet. App. 2a.

The decision to use single-line scanners became a flash point with the USPS Board of Governors and with Congress. Pet. App. 3a. In 1984, a study by Congress's Office of Technology Assessment ("OTA") concluded that the use of single-line scanners would cause over $1 million per day in operational losses. Pet. App. 3a. Ultimately, when it became apparent that postal customers were not using nine-digit zip codes at the necessary levels, the Postal Service was forced in 1985 to make a "mid-course correction" and

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[2] As used herein, the term "Postal Inspectors" refers to Petitioners and Daniel Harrington, a defendant who died during the pendency of this lawsuit.

employ multi-line scanners. Pet. App. 4a. As a result of the controversy, Bolger's successor, Paul Carlin, and other senior USPS managers who had supported single-line scanners were reassigned, fired or forced to retire. C.A. App. 779; *United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 598-99 (D.D.C. 1989).

2. Moore's Lobbying and Public Criticism of the USPS. Moore and REI were at the epicenter of the scanner controversy. Moore thought the decision to rely upon single-line scanners was unsound, and he unabashedly and aggressively took his case to PMG Bolger, the Board of Governors, Congress, and the public—as he was constitutionally entitled to do. Pet. App. 3a; C.A. App. 851-52. As a result of this lobbying, Moore persuaded Congressman Martin Frost to initiate the OTA study and, later, to introduce an amendment to an appropriations bill requiring the USPS to buy American multi-line technology. Pet. App. 3a; C.A. App. 852-53. Not surprisingly, USPS management saw Moore and REI as the enemy.

3. Petitioners' Investigation of Moore's Political Activities. Motivated by hostility towards Moore for his role in the scanner-procurement controversy, the Postal Inspectors launched a retaliatory investigation of Moore's activities. As early as December 1985, the Postal Inspectors prepared an "Investigative Strategies" memo that labeled Moore and REI as "coconspirators in a scheme to defraud the U.S. Postal Service," even though, as Petitioner Edwards later conceded, there was no evidence that any such conspiracy existed. C.A. App. 246.

Pursuant to this strategy, the Postal Inspectors scrutinized REI's and Moore's political contributions and communications with public officials with no apparent regard for the First Amendment protection afforded to these activities. Pet. App. 21a-22a. Thus, the Postal Inspectors issued subpoenas for records concerning Moore's and REI's

political contributions, "meetings with United States Congressmen," "articles placed with trade publications and reporters," and "interviews with journalists and reporters." Pet. App. 21a-22a. They also questioned REI officials about the company's lobbying efforts, political contributions, and fundraising; interrogated a congressional staffer about her Congressman's assistance to REI; and even tried to dig up "dirt" to throw on REI's congressional supporters, as shown in a USPS document produced in discovery. C.A. App. 194, 247-49.

4. The Voss/Gnau Kickback Scheme. In late February 1986—after they had prepared the "Investigative Strategies" memorandum and begun to investigate Moore's and REI's political and media activities—the Postal Inspectors discovered that Peter Voss, a member of the USPS Board of Governors, was receiving payments from John Gnau, the principal of Gnau & Associates, Inc. ("GAI"), the consulting firm that REI had hired—on Voss's recommendation—to assist with its lobbying efforts. Pet. App. 4a; C.A. App. 172, 212-13, 216-17. The Postal Inspectors quickly learned that Voss and his administrative assistant, along with Gnau and two other GAI officials, were involved in the conspiracy. Pet. App. 4a; C.A. App. 304. Three of the coconspirators plead guilty; the other two received immunity from prosecution in exchange for cooperation. Pet. App. 4a; C.A. App. 287-88.

The Known Conspirators Exonerate Moore — Though lacking any evident reason to protect Moore, none of the coconspirators ever implicated Moore in the kickback conspiracy. Pet. App. 25a. The Postal Inspectors repeatedly urged the conspirators to implicate Moore, on occasion using "extraordinary" and improper pressure tactics, but again and again the conspirators each informed the inspectors that Moore was not involved. *Id.* Voss even told the Postal Inspectors that there was "no way Moore knew" anything improper was occurring. Pet. App. 26a.

5. Petitioners' Retaliatory Efforts to Procure Moore's Indictment. Having failed to find any direct evidence to tie Moore to the kickback scheme, the Postal Inspectors resorted to highly unusual and deceptive tactics to obtain Moore's indictment.

Petitioners' Retaliatory Intent — The Postal Inspectors candidly acknowledged in writing that a primary reason for pursuing Moore and REI was Moore's attempt to reverse the decision to employ single-line scanners through lobbying against, and public criticism of, USPS management. In a memorandum entitled "Arguments for Indicting the Corporation"—which the court of appeals described as "evidence of retaliatory motive . . . close to the proverbial smoking gun" (Pet. App. 28a)—the inspectors' very *first* justification for indicting REI, completely "[i]ndependent of [the] Voss/GAI actions," was that "the corporation and its PAC funded a media and political campaign to discredit USPS management and cause financial harm to USPS, for example . . . staged questions and testimony before Congress [and] Frost amendment to freeze USPS appropriations bill." Pet. App. 20a.

Likewise, in a "Details of Offense" memorandum for the U.S. Attorney summarizing the evidence supporting an indictment, the inspectors wrote that REI's fraudulent intent is evident, among other things, in the fact that "at Moore's and Reedy's suggestion and with their substantial input relative to its drafting, Congressman Frost proposed an amendment to a USPS appropriat[ions] bill that in effect would freeze USPS revenue until [multi-line scanners] were purchased from REI." Pet. App. 21a; *see also id.* ("During the period August 1985 to April 1986, REI continued to

undermine the competitive testing program via the media and Congress.").[3]

Lobbying of the U.S. Attorney — The Postal Inspectors also met with the U.S. Attorney's office on numerous occasions to advocate the indictment of Moore, Reedy, and REI. C.A. App. 253-54, 1430, 1550, 1554. Paul Knight and Charles Leeper, the Chief and Deputy Chief of Prosecutions, were not impressed, concluding that, while Moore and REI "played 'hardball' with the Postal Service," the evidence that Moore and Reedy acted criminally or knew about the payments to Voss was "not particularly strong," and the case against Moore was especially weak. C.A. App. 1429, 1433; Pet. App. 26a. Nonetheless, the Postal Inspectors continued to push for Moore's indictment, *see* C.A. App. 253-54, 1477-80, and, as a result of this "unusual prodding," the U.S. Attorney's office ultimately relented and approved the prosecution. Pet. App. 27a.

Misconduct Before the Grand Jury — In presenting their case to the grand jury, the Postal Inspectors went to extreme and improper lengths to keep the grand jury from hearing witnesses say that Moore did not know about the kickback scheme. Certain coconspirators and other witnesses testified, not by way of ordinary questions and answers, but by reading statements carefully scripted for them by the Postal

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[3] The rest of the memorandum is peppered with references to Moore's and REI's lobbying activities. *See, e.g.*, C.A. App. 680 ("REI lobbied several Congressmen to pressure USPS into purchasing equipment from REI"); *id.* ("REI drafted letters which Congressmen sent to USPS"); *id.* ("Reedy and Moore worked with Congressman Frost to draft an amendment to a USPS appropriations bill"); C.A. App. 755 (noting entries from Moore's diary concerning congressional hearings); C.A. App. 763 (noting Moore diary entry considering whether to apply "additional public pressure" through "[c]ongressional inquiry," "[l]etter writing," and "[n]ational press").

Inspectors in order to prevent the witnesses from telling the grand jury that they never told Moore or anyone else at REI about the payments to Voss, C.A. App. 197-98, 226—in violation of Department of Justice guidelines requiring presentation of exculpatory evidence to the grand jury, *see* Department of Justice, *United States Attorneys' Manual* § 9-11.233 (Oct. 1, 1988). Contrary to Postal Service policy, C.A. App. 197, the Postal Inspectors also refused to honor the request of one witness to correct the statement they drafted for him, and refused to allow that witness to answer questions from the grand jury. Pet. App. 27a. The Postal Inspectors also improperly showed another witness the scripted grand-jury statements of his coconspirators in order to elicit an "opinion" contrary to his personal knowledge that Moore knew that Voss was receiving money from Gnau; the Postal Inspectors then presented this "opinion" to the grand jury as evidence. Pet. App. 25a-26a; C.A. App. 1000-01.

6. Moore's Acquittal. Following Moore's indictment, the house of cards constructed by the Postal Inspectors collapsed. After the Government presented its case for six weeks, Moore, Reedy and REI filed motions for acquittal, which Judge Revercomb granted due to lack of evidence:

> The government's evidence is insufficient, even when viewed in the light most favorable to it, for a trier of fact to find guilt beyond a reasonable doubt. Much of what the government characterizes as incriminatory evidence is not persuasive of guilt when viewed in its full context. In fact, some of the government's evidence is exculpatory and points towards innocent conduct of the Defendants.

Recognition Equip., 725 F. Supp. at 587-88. There was, Judge Revercomb noted, a "complete lack of direct evidence to suggest that the Defendants knew of the illegal payoff scheme" between Voss and Gnau; indeed, "[a]ll of the unindicted coconspirators who testified expressly stated that they never told Moore or Reedy about the payments from Gnau to Voss." *Id.* at 596.

Consequently, even when viewed in the light most favorable to the Government, the Government's evidence did not "support a reasonable inference that the Defendants knew" of the conspiracy they allegedly joined. *Id.* at 589.

7. Moore's Lawsuit. Despite being acquitted, Moore was financially devastated by the indictment and prosecution wrongly procured by the Postal Inspectors. The mere fact of the indictment caused REI to be debarred from the scanner procurement, and Moore was suspended pursuant to a "cleansing plan" formulated by the Postal Inspectors and imposed on REI. C.A. App. 255. The publicly traded company that Moore had rescued from the brink of bankruptcy declined, was acquired by a smaller competitor, and eventually went out of business. C.A. App. 858. Moore also suffered the career equivalent of the death penalty. Prior to his indictment, as a well-respected executive in the high-tech industry, Moore had a reasonable prospect of becoming the CEO of one of the nation's biggest technology companies. C.A. App. 856. After the indictment, he was not even considered for such positions because no Board of Directors would hire someone who had been indicted. *Id.*

Moore sought compensation for his injuries by suing the Postal Inspectors, the prosecutor and the United States. Moore's claims and the thirteen-year history of this case are described in the Petition. Pet. at 7-12. Fact discovery has largely concluded, and, following the district court's denial of the defendants' motions for summary judgment (Pet. App. 42a), which the United States has not appealed, Moore's malicious-prosecution claim against the United States under the Federal Tort Claims Act ("FTCA") is awaiting trial.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW WAS DICTATED BY THIS COURT'S HOLDINGS IN *MT. HEALTHY* AND *CRAWFORD-EL*

Moore has presented compelling evidence that Petitioners procured his prosecution in retaliation for his exercise of First Amendment rights. *See supra* pp. 4-8. Petitioners do not challenge this evidence on appeal. Nor do Petitioners argue that Moore would have been prosecuted even absent their retaliatory motive. Instead, Petitioners argue that they are nevertheless entitled to qualified immunity—regardless of whether their improper intent caused Moore's prosecution—if they can establish that there was probable cause for that prosecution.[4]

Despite Petitioners' characterization of this question as one that has sharply divided the courts of appeals, the D.C. Circuit's rejection of their qualified-immunity defense represents a straightforward application of this Court's settled precedents on First Amendment retaliation and qualified immunity.

1. Since at least 1977, when this Court decided *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), it has been clearly established that an act taken in retaliation for the exercise of a First Amendment right violates the Constitution and is actionable even if the act, when taken for a different purpose, would have been proper. In *Mt. Healthy*, this Court considered whether the First Amendment permitted a high-school teacher to be

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[4] Even on their own view of the law, Petitioners' claimed entitlement to qualified immunity is entirely hypothetical because the district court found that there are material facts in dispute concerning whether there was probable cause to prosecute Moore. *See infra* Part IV.

discharged for publicly disclosing a grievance. Although the teacher was untenured and therefore terminable for any reason or no reason whatsoever, the Court held that he could "nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Id.* at 283-84. Since then, this Court has expressly observed that this general rule applies to retaliatory prosecutions. *See Wayte v. United States*, 470 U.S. 598, 608 (1985) ("[T]he decision to prosecute may not be deliberately based upon an unjustifiable standard . . . including the exercise of protected . . . constitutional rights" (citations and quotation marks omitted)).

2. For several years, the lower courts struggled to apply *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), which held that the defense of qualified immunity turns on the objective legal reasonableness of the conduct at issue, to claims, like the one in *Mt. Healthy*, based on allegations that an otherwise legitimate act had been taken with an unconstitutional motive. This Court resolved that debate in *Crawford-El v. Britton*, 523 U.S. 574 (1998), a case involving a prisoner's claim that a prison official had misdirected the prisoner's personal belongings in retaliation for the prisoner's exercise of his First Amendment rights.[5] The Court rejected any heightened pleading or proof standard for *Mt. Healthy*-style claims and, disagreeing with a position advocated by the dissent, held further that a government official defending against such a claim is not entitled to qualified immunity simply because the official's

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[5] Although *Crawford-El* involved a claim under 42 U.S.C. § 1983, this Court has held (as Petitioners implicitly concede, *see* Pet. at 13) that the standards for qualified immunity in a *Bivens* action are the same as the standards for qualified immunity in an action under § 1983. *See Butz v. Economou*, 438 U.S. 478, 500-01 (1978).

conduct was "objectively valid, regardless of improper intent." *Id.* at 594 (internal quotation marks omitted); *see also id.* at 593 (citing *Mt. Healthy*); *cf. id.* at 602 (Rehnquist, C.J., dissenting) (reasoning that a defendant should not be entitled to qualified immunity if the plaintiff can show through objective evidence that the alleged lawful reason for defendant's action "is actually a pretext").

3. Petitioners' argument—that a showing of probable cause, no matter how weak, and no matter how strong the evidence of retaliatory motive, necessarily entitles them to qualified immunity—contravenes both *Mt. Healthy* and *Crawford-El*. As *Mt. Healthy* makes clear, the absence of any possible legitimate reason for the challenged official act is *not* an element of a cause of action for retaliation against the exercise of First Amendment rights.[6] Moreover, just as the objective reasonableness of the defendant's acts in *Crawford-El* did not entitle her to qualified immunity from the prisoner's claim that the acts were taken with a motive to retaliate against him for the exercise of his First Amendment rights, so, too, here the alleged objective reasonableness of the Petitioners' acts (measured by whether there was probable cause to prosecute Moore) does not entitle them to qualified immunity from Moore's claim that he was prosecuted in retaliation for the exercise of his First Amendment rights.

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[6] As the court of appeals recognized, *Mt. Healthy* does have a "test of causation" (429 U.S. at 286) that would enable Petitioners to defeat Moore's claims by showing that the same decision to prosecute would in fact have been made even if the impermissible purpose had not been considered. Pet. App. 19a-20a; *Mt. Healthy*, 429 U.S. at 287. Of course, arguing, as Petitioners do here, "that the same decision would have been *justified* . . . is not the same as proving," as *Mt. Healthy* requires, "that the same decision would have been *made*." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995) (emphasis added, internal quotation marks omitted).

The D.C. Circuit's analysis comports with these principles. Judge Tatel, in a unanimous opinion joined by Judges Sentelle and Williams, followed *Mt. Healthy* and *Crawford-El*, as well as settled D.C. Circuit authority, in holding that "clearly established law . . . barred government officials from bringing charges they would not have pursued absent retaliatory motive, regardless of whether they had probable cause to do so." Pet. App. 2a. This holding, the court further explained, is "limited." Pet. App. 19a. "Given that probable cause ordinarily suffices to initiate a prosecution, that showing will be enough in most cases to establish that prosecution would have occurred absent bad intent." Pet. App. 19a. But "recovery remains possible . . . where," as here, "strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus." Pet. App. 20a; *cf. Mt. Healthy*, 429 U.S. at 285 ("[a] borderline or marginal [choice] should not [be] resolved against [an individual] because of constitutionally protected conduct"). This decision, in an unusual case with "proverbial smoking gun" evidence of retaliatory motive (Pet. App. 28a) was a proper—and completely unremarkable—application of this Court's settled precedents, and does not merit the Court's review.[7]

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[7] Petitioners make much of a proposed analogy between selective-prosecution claims under the Equal Protection Clause and retaliatory-prosecution cases under the First Amendment. Because the standard for selective-prosecution claims involves both a subjective component of "discriminatory motive" and an objective component of "discriminatory effect," *see Wayte*, 470 U.S. at 608, Petitioners posit that retaliatory-prosecution claims should require an objective showing of probable cause. Even if this question were not already resolved by the precedents discussed above, Petitioners' analogy would not withstand scrutiny.

First, the D.C. Circuit's decision already requires an objective showing, namely, that defendants' improper intent had the effect of

II. PETITIONERS OVERSTATE THE DIVISION OF AUTHORITY AMONG LOWER COURTS, WHICH SHOULD, IN ANY EVENT, BE GIVEN FURTHER OPPORTUNITY TO PERCOLATE IN LIGHT OF *CRAWFORD-EL*

Contending that this Court should nevertheless review the decision below to resolve a circuit split, Petitioners cite several cases that, in their view, establish that a showing of probable cause should entitle them to qualified immunity from claims that they retaliated against Moore for his exercise of First Amendment rights. But Petitioners significantly overstate the division of authority. At least three circuits apply a rule entirely consistent with the decision below. And those decisions in purported conflict with the opinion below not only demonstrate superficial treatment of the legal issues and uncritical reliance on circuit precedent predating *Crawford-El*, but also involve underlying facts that differ substantially from the unique circumstances of this case. Indeed, the rule applied by the D.C. Circuit would likely yield the same result as that of the purportedly conflicting decisions in the vast majority of circumstances. Thus, the split alleged by Petitioners is overstated, and even if the Court were inclined to resolve it, further percolation would be warranted.

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bringing about a prosecution that otherwise would not have occurred. Second, the D.C. Circuit's decision also already incorporates an objective showing of probable cause, deeming it "enough in most cases to establish that prosecution would have occurred absent bad intent." Pet. App. 19a. Third, the D.C. Circuit's decision actually brings more parity to selective-prosecution and retaliatory-prosecution claims; now, under both theories, probable cause operates only as a "defense to the charges" once a *prima facie* case is shown. Pet. App. 18a. Fourth and finally, any difference in the elements of the claims is justified by the different constitutional sources of the right at issue.

1. The decision of the D.C. Circuit below is entirely consistent with decisions from the Sixth and Tenth Circuits. For example, "[a]pplying the logic of *Mt. Healthy*," the Sixth Circuit has held that prosecutions or arrests "undertaken at least in part as retaliation for . . . constitutionally protected [speech are] impermissible unless it could be shown that the officer would have made the arrest even in the absence of any retaliatory motive." *Greene v. Barber*, 310 F.3d 889, 897 (6th Cir. 2002). Similarly, the Tenth Circuit has held that the fact that the conduct warranted the charges is not a defense to a First Amendment claim of retaliatory prosecution. *Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001).

Contrary to Petitioners' assertion, moreover, the Third Circuit's holding in *Merkle v. Upper Dublin School District*, 211 F.3d 782 (3d Cir. 2000), is also in accord with these decisions. In *Merkle*, the court held that a plaintiff alleging retaliatory action on account of her exercise of First Amendment rights must show only that the protected "speech was a motivating factor in the alleged retaliatory action." *Id.* at 793. Recognizing that a defendant could defeat such a claim by showing that "it would have taken the same adverse action . . . even in the absence of [the] protected speech," *id.*, the court found that weak evidence of probable cause gave rise to the inference that the motive was retaliatory and *denied* the defendant the protection of qualified immunity. *Id.* at 797-98. Even the third member of the panel, who would have upheld the qualified-immunity defense on the facts of the case, agreed that "it would be possible to sustain a First Amendment retaliation case predicated on the institution of criminal proceedings even though the defendant had probable cause to initiate the proceedings." *Id.* at 800 n.2 (Greenberg, J., concurring and dissenting).

Moreover, although Petitioners rely on decisions of the Second Circuit to establish a split, that court has made inconsistent pronouncements on the relevance of probable

cause to the qualified-immunity inquiry. Thus, while *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001), held that the presence of probable cause exonerates an official irrespective of motive, *Kerman v. City of New York*, 261 F.3d 229, 242 (2d Cir. 2001), a decision predating *Curley* by several weeks, held that, irrespective of probable cause, "direct evidence" of retaliatory intent suffices to allege a constitutional violation and defeat a claim for qualified immunity. In the only relevant district court case in the Second Circuit decided since then, the court followed the reasoning of *Kerman*, not *Curley*. *See Webster v. City of New York*, 333 F. Supp. 2d 184, 202-03 (S.D.N.Y. 2004); *cf. Blue v. Koren*, 72 F.3d 1075, 1083 n.5 (2d Cir. 1995) (describing contrary precedent, including *Mozzochi v. Borden*, 959 F.2d 1174 (2d Cir. 1992), as "troubling").

2. The split of authority alleged by Petitioners, *see* Pet. at 14, is also overstated because the rule applied by the D.C. Circuit would yield the same result as that of the purportedly conflicting decisions in the vast majority of circumstances.

The D.C. Circuit characterized its holding as "limited." The court explained:

> Given that probable cause ordinarily suffices to initiate a prosecution, that showing will be enough in most cases to establish that prosecution would have occurred absent bad intent. . . . [R]ecovery remains possible [only] in those rare cases where strong motive evidence combines with weak probable cause . . . .

Pet. App. 19a-20a. This is one of those "rare" cases: Moore has presented "evidence of retaliatory motive [that] comes close to the proverbial smoking gun," demonstrated that "evidence of [his] guilt seems quite weak" and shown the presence of "considerations that, under normal circumstances, might weigh against prosecuting a marginal case." Pet. App. 28a.

The bulk of the purportedly conflicting cases cited by Petitioners, by contrast, fall beyond these "limited"

circumstances, and into the "ordinar[y]" realm of cases where probable cause so clearly justifies a prosecution or an arrest as to either defeat any inference of retaliatory motive or leave no doubt that the arrest or prosecution would have occurred even absent the improper motive.

The Second and Eighth Circuit cases cited by Petitioners are illustrative, because—unlike this case—they involved little or no indicia of improper motive and strong evidence of probable cause. *See Curley*, 268 F.3d at 73 (finding probable cause to arrest plaintiff and "no evidence" of motive "beyond the allegation in [the plaintiff's] amended complaint"); *Smithson v. Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000) (finding probable cause to arrest the plaintiff while "seriously doubt[ing]his claim of pretext"); *cf. Blue*, 72 F.3d at 1083 n.5 (distinguishing circuit precedent, including *Mozzochi v. Borden*, 959 F.2d 1174 (2d Cir. 1992), by noting that cases "stressed the lack of particularized evidence of a retaliatory motive"). The cases cited by Petitioners from the Fifth and Eleventh Circuits similarly involved strong findings of probable cause that supported the grant of summary judgment in favor of defendants. *See Izen v. Catalina*, 398 F.3d 363, 368-69 (5th Cir. 2005) (per curiam); *Dahl v. Holley*, 312 F.3d 1228, 1235-36 (11th Cir. 2002); *Wood v. Kesler*, 323 F.3d 872, 879, 883 (11th Cir.), *cert. denied*, 540 U.S. 879 (2003); *Draper v. Reynolds*, 369 F.3d 1270, 1277 n.11 (11th Cir.), *cert. denied*, 125 S. Ct. 507 (2004).

Were the D.C. Circuit's methodology and holding to be applied to the facts of these "ordinar[y]" cases, their outcomes would presumably remain the same. The strong showing of "probable cause" in each case would have "suffice[d] to . . . establish that prosecution would have occurred absent bad intent." Pet. App. 19a. A split of authority that is limited to exceedingly "rare"—and, in most circuits, as yet hypothetical—factual settings is unworthy of this Court's attention.

3. In any event, the cases cited by Petitioners as creating a purported conflict with the opinion below generally reflect only cursory reasoning and either predate *Crawford-El* or fail to cite *Crawford-El* while placing dispositive, uncritical reliance on cases decided before it. *See, e.g.*, *Smithson*, 235 F.3d at 1063 (summarily relying on circuit precedent predating *Crawford-El*); *Keenan v. Tejeda*, 290 F.3d 252, 261-62 (5th Cir. 2002) (same); *Curley*, 268 F.3d at 73 (same). Even if the Court were inclined to view the cases as conflicting, therefore, further percolation would be warranted.

The Second Circuit's caselaw demonstrates the value of further percolation in these circumstances. In *Curley*, the court held that probable cause to arrest plaintiff warranted summary judgment for the defendant without inquiry into the underlying motive for the arrest. *Curley*, 268 F.3d at 73. Contemporaneous with that decision and since that time, however, the Second Circuit and district courts therein have relied upon *Crawford-El* to define retaliatory prosecution and qualified immunity without reference to probable cause and in accord with the decision of the D.C. Circuit below. *See Kerman*, 261 F.3d at 241-42; *Webster*, 333 F. Supp. 2d at 201. These latter decisions were not cited by Petitioners, and illustrate the gradual shift of authority as courts reconcile legal issues to varied factual settings and this Court's jurisprudence.

"[W]hen frontier legal problems are presented, periods of 'percolation' in . . . federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (citing *McCray v. New York*, 461 U.S. 961, 961-63 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari)). A fact-specific and hypothetical split of authority—based at least partly on cases relying on dated circuit precedent—does not warrant this Court's review.

III. THE QUESTIONS PRESENTED ARE NOT OF RECURRING IMPORTANCE

There is no merit to Petitioners' contention that review is warranted because the decision below will purportedly lead courts and civil juries "routinely" to second-guess the basis for criminal prosecutions and "may well increase" the number of retaliatory-prosecution actions that are brought. Pet. at 19. On the contrary, as the court below recognized, its ruling that the existence of probable cause does not defeat a claim of retaliatory prosecution is "limited" and will permit recovery only in "rare cases." Pet. App. 19a-20a.

First, the doctrine of absolute prosecutorial immunity ensures that prosecutors will almost always be entitled to immunity from suits for retaliatory prosecution in violation of the First Amendment. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 424 (1976). Indeed, the Assistant United States Attorney who prosecuted Moore successfully asserted a defense of absolute immunity in an earlier stage of this case. Pet. App. 81a-82a. For this reason, claims for retaliatory prosecution will generally be viable only where, as here, government officials who are not prosecutors had a substantial role in procuring the indictment or prosecution.

Second, Petitioners repeatedly mischaracterize the opinion below by arguing that, under the D.C. Circuit's approach, "probable cause is irrelevant" and "the existence of probable cause is not an obstacle to suit." Pet. at 19. On the contrary, the D.C. Circuit explained that because "probable cause ordinarily suffices to initiate a prosecution, that showing will be enough in most cases to establish that prosecution would have occurred absent bad intent" and therefore to immunize defendants from liability. Pet. App. 19a. Thus, as this Court recognized in *Crawford-El*, "existing law already prevents [allegations of] unconstitutional motive from automatically carrying a plaintiff to trial." 523 U.S. at 592. In particular, a defendant can still prevail prior to trial by showing that there

is no doubt that the same decision to prosecute would have been reached in the absence of the improper motive. *See id.* (explaining that the rules of causation set forth in *Mt. Healthy* may "facilitate summary judgment"); *see also supra* note 6.

Here, Petitioners' qualified-immunity defense was denied only because, as the court below recognized, the record contains evidence of retaliatory motive that "comes close to the proverbial smoking gun" (Pet. App. 28a; *see also supra* p. 6) and "quite weak indicators of probable cause" (Pet. App. 20a), thereby supporting the conclusion that "the prosecution would not have happened without retaliatory motive" (Pet. App. 22a). This situation, as the Court of Appeals recognized, is quite the "rare case[]." Pet. App. 20a.

Indeed, even though the D.C. Circuit's rule is not new, Pet. App. 29a, incidents of retaliatory-prosecution claims going to trial are exceedingly rare. In fact, a Westlaw search of jury verdicts reveals no verdicts on retaliatory-prosecution claims in the D.C. Circuit. There is simply no support for Petitioners' unfounded fear that the D.C. Circuit's rule will lead to increased litigation second-guessing legitimate prosecutorial decisions.

IV. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

Even were the Court inclined to address the question whether there should be an exception from the rules of *Mt. Healthy* and *Crawford-El* in the context of retaliatory prosecutions, this case does not provide an appropriate context to do so.

Even on their own view of the law, Petitioners' claimed entitlement to qualified immunity is entirely hypothetical. That is so because, as the district court determined in denying the United States' motion for summary judgment on Moore's malicious-prosecution claim against the United

States, there are material facts in dispute concerning whether there was probable cause to prosecute Moore. Pet. App. 42a. In particular, much of this dispute revolves around the improper tactics used by Petitioners in procuring and presenting evidence to the grand jury, *see supra* pp. 7-8, and whether the use of such tactics demonstrates that the Postal Inspectors knew that they lacked probable cause. *See, e.g.*, Pet. App. 27a (noting that "the inspectors behaved before the grand jury as if their case needed bolstering"). As a result of these unresolved factual disputes, Petitioners will not be entitled to qualified immunity even if they could prevail before this Court. To the contrary, Petitioners interlocutory appeal threatens to involve the appellate courts in precisely the sort of factual inquiry that should await final judgment.

In the qualified immunity context, an interlocutory order denying summary judgment is appealable only if it raises a "purely legal" issue that "can be decided with reference only to undisputed facts." *Mitchell v. Forsyth*, 472 U.S. 511, 529 n.10, 530 (1985). Questions of "evidentiary sufficiency," on the other hand, may not be decided on an interlocutory appeal from the denial of qualified immunity. *Johnson v. Jones*, 515 U.S. 304, 317-18 (1995). In arguing to the court of appeals below and now to this Court that the existence of probable cause warrants qualified immunity, Petitioners are directly challenging the district court's determination that Moore's evidence is sufficient to permit a jury to conclude that probable cause did not exist.

Indeed, the D.C. Circuit's conclusion that Petitioners are not entitled to qualified immunity centered around that court's view that the evidence of probable cause in this case is "quite weak." Pet. App. 22a. In particular, there was no evidence that Moore either knew of the kickback conspiracy or agreed to join it. Pet. App. 25a. Indeed, though lacking any apparent reason to protect Moore, and despite "extraordinary pressure" placed on them by Petitioners, the coconspirators uniformly denied that they ever told Moore

about the payments. Pet. App. 25a. Moreover, the evidence on which Petitioners rely to show probable cause either relates to Reedy, Moore's colleague at REI, rather than to Moore himself, Pet. App. 23a or "reflect[s] perfectly innocent business considerations," Pet. App. 24a. *See also Recognition Equip.*, 725 F. Supp. at 587-88 ("Much of what the government characterizes as incriminatory evidence is not persuasive of guilt when viewed in its full context."). Other evidence, such as Petitioners' misconduct during the grand-jury proceedings, *see supra* pp. 7-8, shows that, by "behav[ing] before the grand jury as if their case needed bolstering," Pet. App. 27a, Petitioners knew that they did not have probable cause to prosecute Moore.[8]

Under these circumstances, Petitioners do not present a pure legal question for resolution. Instead, their claimed entitlement to qualified immunity is inextricably intertwined with an assessment of whether the voluminous record evidence, when viewed in the light most favorable to Moore, is sufficient to permit a jury to conclude that probable cause was absent. This is precisely the sort of assessment that should not be made by an appellate court until a final judgment has issued.

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[8] Indeed, given the procedural posture of this case, granting qualified immunity to Petitioners at this time will do little to further one of the principal goals of that defense, namely "to protect public servants from the burdens of trial and discovery," *Crawford-El*, 523 U.S. at 576; *see also Harlow*, 457 U.S. at 816 (noting that pretrial discovery "can be peculiarly disruptive of effective government"). This is so because fact discovery in this case has largely concluded, and a trial centering around Petitioners' conduct is all but inevitable, given the district court's denial of summary judgment on Moore's FTCA claim against the United States for malicious prosecution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 04-1495

In the Supreme Court of the United States

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM G. MOORE, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent contends (Br. in Opp. 10-22) that the court of appeals' decision was dictated by this Court's precedents; that the circuit conflict identified in the petition does not need to be resolved; that the questions presented do not have recurring importance; and that this case is an unsuitable vehicle for deciding them. Each of these contentions is mistaken.[1]

A. The Court Of Appeals' Decision Was Not Dictated By This Court's Precedents

Contrary to respondent's contention (Br. in Opp. 10-13), this case does not involve "a straightforward application" (*id.* at 10)

[1] Respondent does not take issue with petitioners' submission (Pet. 22-25) that, if the Court grants certiorari on question one (whether the existence of probable cause defeats a claim of retaliatory prosecution), it should also grant certiorari on question two (whether, if the existence of probable cause does not defeat a claim of retaliatory prosecution, the law to that effect was clearly established when respondent was charged).

of *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and *Crawford-El* v. *Britton*, 523 U.S. 574 (1998). Claims of retaliatory *prosecution* are distinct from other First Amendment-based retaliation claims and, again contrary to respondent's contention (Br. in Opp. 13-14 n.7), are governed by principles analogous to those that govern claims of selective prosecution.

1. *Mount Healthy* does not hold that *any* act "taken in retaliation for the exercise of a First Amendment right violates the Constitution and is actionable even if the act, when taken for a different purpose, would have been proper." Br. in Opp. 10. Like the other decisions in the line of cases beginning with *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), *Mount Healthy* involved a First Amendment challenge to a personnel decision by a public employer. The principle established in those cases thus does not apply to every "act" by the government, much less to a decision to prosecute. Unlike the decision whether to dismiss, demote, or transfer an employee, the decision whether to prosecute is one that courts are "properly hesitant to examine." *Wayte* v. *United States*, 470 U.S. 598, 608 (1985). Prosecutorial decisionmaking is a "core executive constitutional function," *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996), and inquiries into whether a prosecutor or grand jury would have acted absent consideration of a particular factor are fraught with difficulty. Accordingly, the standard for a claim of retaliatory prosecution, unlike that for a claim of a retaliatory personnel decision, must be "particularly demanding." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999).

As for *Crawford-El*, that case rejected "special procedural rules" for "constitutional claim[s] that require[] proof of improper motive." 523 U.S. at 577. This case does not implicate an across-the-board procedural rule for claims of that type—or, indeed, *any* procedural rule. Rather, petitioners contend that, in the unique context of prosecutorial decisionmaking, a substantive

claim of retaliatory prosecution in violation of the First Amendment will not lie if the charges are supported by probable cause. This Court's decisions hold that, in the same prosecutorial context, it is not a violation of equal protection to act on the basis of a discriminatory motive if charges are also filed against those who are similarly situated. See Pet. 16-18. *Crawford-El* obviously does not alter that principle, and it has no greater bearing on the questions presented here.

Respondent likewise ignores *Heck* v. *Humphrey*, 512 U.S. 477 (1994), in which this Court made clear that the absence of probable cause is a substantive element of the common-law tort of malicious prosecution. *Id.* at 485 n.4. Nothing in *Crawford-El* alters the substantive elements of a malicious-prosecution claim, and respondent's assertion that petitioners retaliated against him for the exercise of his First Amendment rights is merely one species of such a claim. See Pet. 18-19. Thus, the rule that petitioners advocate in this case, unlike the heightened pleading rule rejected in *Crawford-El*, has a firm "common-law pedigree." 523 U.S. at 595.

2. Respondent does not offer any persuasive ground for distinguishing retaliatory prosecution from selective prosecution, such that an objective showing is required in the latter but not the former context. Respondent contends that "any difference in the elements of the claims is justified by the different constitutional sources of the right at issue." Br. in Opp. 14 n.7. But a regime in which it is easier to establish a claim of retaliatory prosecution than a claim of selective prosecution would make sense only if free speech were somehow more important than the equal protection of the laws, and no one (including respondent) takes that position. See Pet. 17-18.

In the alternative, respondent contends that the court of appeals' standard for retaliatory-prosecution claims *does* "require[] an objective showing"—namely, that "defendants' improper intent had the effect of bringing about a prosecution that otherwise

would not have occurred." Br. in Opp. 13-14 n.7. Indeed, respondent goes so far as to argue that the court of appeals' standard "incorporates an objective showing of *probable cause*," *id.* at 14 n.7 (emphasis added), since probable cause (according to respondent) will be "enough in most cases to establish that prosecution would have occurred absent bad intent," *ibid.* (quoting Pet. App. 19a). But in light of prosecutorial discretion, a showing that charges would have been brought even in the absence of a retaliatory motive is a *subjective* showing, requiring—as respondent himself asserts (*id.* at 12 n.6)—a demonstration that the prosecution *would* have occurred, not that it *could* have. And as the court of appeals recognized (Pet. App. 13a), the existence of probable cause is only one of many factors that bear on the ultimate *subjective* question whether charges would have been brought if there had been no retaliatory motive. See Pet. 21-22. Moreover, that subjective inquiry is one that necessarily intrudes into the deliberations concerning prosecutorial discretion, while a truly objective inquiry allows courts to avoid such intrusion.

B. The Circuit Conflict Should Be Resolved By This Court

As the petition explains (at 13-15), there is a five-to-three circuit conflict, acknowledged within the last seven months by courts on both sides of the issue, on the question whether the existence of probable cause defeats a claim of retaliatory prosecution. Respondent contends (Br. in Opp. 14-18) that petitioners have overstated the division of authority and that, in any event, further percolation is warranted. Respondent is mistaken.

1. Contrary to respondent's contention (Br. in Opp. 15), the Third Circuit did decide in *Merkle* v. *Upper Dublin School District*, 211 F.3d 782 (2000), that the existence of probable cause defeats a claim of retaliatory prosecution. The plaintiff in that case claimed that the defendants had "instituted a criminal prosecution against her" in retaliation for her speech, *id.* at 793, and the court of appeals reversed summary judgment for the defen-

dants because a jury could find that the prosecution was "motivated by a desire to retaliate" against the plaintiff, *id.* at 796. In so holding, the court found "groundless" the concern that its decision would make employers "reluctant to bring criminal proceedings against an employee even when the employee is found violating the criminal law," because, the court explained, an employer incurs no risk of a suit for retaliatory prosecution when (unlike in that case) "the employer has probable cause to believe that its employee had committed a criminal violation." *Ibid.* As the court below recognized (Pet. App. 15a), the decision in *Merkle* is therefore not "in accord" (Br. in Opp. 15) with the decision in this case.

Respondent is also mistaken in his contention (Br. in Opp. 15-16) that the Second Circuit held in *Kerman* v. *City of New York*, 261 F.3d 229 (2001), that a plaintiff can establish retaliatory prosecution "irrespective of probable cause" (Br. in Opp. 16). That case did not address the question. See 261 F.3d at 241-242. Nor did the district court decision that purportedly "followed the reasoning" (Br. in Opp. 16) of *Kerman*. See *Webster* v. *City of New York*, 333 F. Supp. 2d 184, 201-203 (S.D.N.Y. 2004). As the petition explains (at 14 n.4), the only Second Circuit decisions that did address the question—including *Curley* v. *Village of Suffern*, 268 F.3d 65 (2001), which was decided after *Kerman*—held that the existence of probable cause does defeat a claim of retaliatory prosecution.

2. Despite his effort to minimize the contrary authority in the Second and Third Circuits, respondent in the end does not dispute that there is a circuit conflict on the question whether probable cause defeats a claim of retaliatory prosecution. Instead, he contends (Br. in Opp. 16-17) that review is unwarranted because the conflicting standards will "yield the same result" except in those cases in which "strong motive evidence combines with weak probable cause," *id.* at 16 (quoting Pet. App. 20a). The cases from the circuits that have adopted petitioners' position,

according to respondent, "involved little or no indicia of improper motive and strong evidence of probable cause," and thus, he argues, "[w]ere the D.C. Circuit's methodology and holding to be applied to the facts of these * * * cases, their outcomes would presumably remain the same." *Id.* at 17.

Respondent's theory is flawed in at least three respects. First, it is not evident why, under the court of appeals' approach, "strong evidence of probable cause" (Br. in Opp. 17) will ordinarily enable a defendant to prevail. Probable cause "represents only one factor among many in the decision to prosecute" (Pet. App. 13a), and thus juries in the minority circuits are free to conclude that, despite abundant evidence of probable cause, charges would not have been filed but for the defendant's retaliatory motive. See Pet. 21-22. Second, even if respondent were correct that a defendant would ordinarily be able to prevail under either standard when probable cause was clearly present, the liability of the when probable cause was present *but not clearly so* would depend on the circuit in which the lawsuit is filed. Third, even if the *outcome* of litigation will be the same in *many* cases, the *conduct* of litigation will be quite different in *all* cases. See Pet. 20-21. In the Second, Third, Fifth, Eighth, and Eleventh Circuits, there will *never* be an inquiry into the motives for bringing a prosecution that is supported by probable cause, and since the existence of probable cause can often be determined as a matter of law at the summary-judgment stage, defendants will routinely be able to prevail before trial. In the District of Columbia, Sixth, and Tenth Circuits, in contrast, there will *always* be an inquiry into motive, and since an improper motive is "easy to allege and hard to disprove," *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004) (quoting *Crawford-El*, 523 U.S. at 585), retaliatory-prosecution cases in those circuits will regularly proceed to trial.

3. In the alternative, respondent contends (Br. in Opp. 18) that the Court should allow further "percolation" so that the

lower courts can consider whether *Crawford-El* requires the conclusion that the existence of probable cause does not defeat a claim of retaliatory prosecution. As explained above, however, see pp. 2-3, *supra*, *Crawford-El* has no bearing on the questions presented in this case. And even if it did, there has already been ample time for "percolation," inasmuch as eight of the ten court of appeals cases that reject the position advocated by respondent were decided after *Crawford-El* was decided. See Pet. 14 & nn.4-8. Indeed, six of the ten cases postdated *Crawford-El* by more than three years. See *ibid.*

C. The Questions Presented Have Recurring Importance

In support of his contention that the issues in this case do not have recurring importance (Br. in Opp. 19-20), respondent points out that "the doctrine of absolute prosecutorial immunity ensures that prosecutors will almost always be entitled to immunity from suits for retaliatory prosecution" (*id.* at 19). Because cases are brought to the attention of prosecutors by the law-enforcement officers who observed or investigated the crime, however, there will almost always be a defendant available to sue for retaliatory prosecution. That is borne out by the large number of reported appellate decisions involving a claim of retaliatory prosecution, including decisions in eight circuits that address the question whether probable cause defeats such a claim.

Respondent also argues that the issues do not have recurring importance because, even under the court of appeals' standard, "a defendant can still prevail prior to trial by showing that * * * the same decision to prosecute would have been reached in the absence of the improper motive." Br. in Opp. 19-20. While that may be true, it is also true that, under the standard advocated by respondent, there will be a problematic examination of the motive for bringing the prosecution in every case, irrespective of whether the officer-defendant ultimately wins or loses, and irrespective of whether the case is resolved before or after trial. As

explained in the petition (at 19-20), the court of appeals' decision is therefore important because it threatens to "undermine prosecutorial effectiveness" (as well as the values underlying absolute prosecutorial immunity) by "revealing the Government's enforcement policy," diverting officers from their duties, and generally "chill[ing] law enforcement." *Wayte*, 470 U.S. at 607.[2]

D. This Case Is A Suitable Vehicle For Resolving The Questions Presented

Respondent contends (Br. in Opp. 20-22) that this case is not a suitable vehicle for deciding whether the existence of probable cause defeats a claim of retaliatory prosecution because the district court found that "there are material facts in dispute concerning whether there was probable cause to prosecute [respondent]" (*id.* at 21), and thus petitioners "will not be entitled to qualified immunity even if they could prevail before this Court" (*ibid.*). That is not correct.

As an initial matter, it is not clear that the district court determined that respondent's evidence "is sufficient to permit a jury to conclude that probable cause did not exist." Br. in Opp. 21. Rather than agreeing with petitioners that the existence of probable cause defeats a claim of retaliatory prosecution but concluding that the question whether there was probable cause

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[2] In the minority circuits, plaintiffs in retaliatory-prosecution cases can be expected to make discovery requests like the interrogatory served by respondent a few days after the certiorari petition was filed. It demands that the government

> [i]dentify all reasons why, in a given case, the United States or its officers might exercise discretion not to prosecute a person for whom there exists probable cause to prosecute, identify and describe all documents that refer or relate thereto or are concerned therewith, and identify each and every person with knowledge thereof.

Resp. Fifth Set of Interrogs. 7 (May 13, 2005).

was for the jury, the district court might have agreed with respondent that probable cause is irrelevant and concluded that it was only the questions of motive and causation that were for the jury. It is impossible to tell from the district court's one-paragraph order (Pet. App. 42a). But whatever the basis for the *district court's* decision, the *court of appeals* explicitly held that a prosecution can violate the First Amendment even if it was supported by probable cause, and thus did not reach the question whether there was probable cause for the prosecution of respondent (*id.* at 12a).

There was, moreover, sufficient circumstantial evidence of respondent's guilt, see, *e.g.*, Pet. 4-6, that, if petitioners prevailed on the legal question, either this Court (if it reached the issue) or the court of appeals or district court (on remand) could easily find that there was probable cause for prosecution. Indeed, if this Court ruled for petitioners on the legal question, a showing of probable cause would not be necessary. Petitioners would be entitled to qualified immunity as long as "a reasonable officer could have *believed* that probable cause existed," *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (emphasis added), and, on this record, it was not unreasonable to believe that there was probable cause. At a bare minimum, a conclusion that a retaliatory-prosecution claim cannot proceed when the prosecution was supported by probable cause could substantially limit the scope of proceedings on remand and avoid the need for problematic discovery into prosecutorial motivations.[3]

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[3] Respondent suggests (Br. in Opp. 21-22) that the court of appeals had no jurisdiction over the appeal from the district court's order denying summary judgment. But the court of appeals had "little trouble rejecting [that] argument," Pet. App. 8a, and its decision on that point (*id.* at 7a-9a) is correct. While "determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case," *Behrens* v. *Pelletier*, 516 U.S. 299, 313 (1996), evidentiary sufficiency was not the issue in the court of appeals. The issue was whether,